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of respect," and the Supreme Courts of Indiana, North Carolina, and Alabama have distinctly repudiated it, the latter overruling a number of cases where its existence had been recognized. See 5 Thompson on Corporations, 5115; *Bank of Crawfordsville v. Dovetail &c. Co.*, 40 N. E. Rep. 810 (Ind.); *Thomson-Houston Co. v. Henderson Co.*, 21 S. E. Rep. 951 (N. C.); *Jewelry Co. v. Volfer*, 17 So. Rep. 525 (Ala.).

Just what the doctrine is, even those who uphold it do not seem to know. It seems to be an accommodating judicial *ignis fatuus*, which is present or absent as courts seem to require. No court has been able to describe it exactly or to define its limits. It is admitted that there is no trust in the strict sense of the term. But these admissions tend to still greater confusion. The logical conclusion of holding that there was a strict trust would be that the creditor of an insolvent corporation could not enforce his claim at law. When this argument was pressed on the court in *Gottlieb v. Miller* (154 Ill. 44), they qualified their previous statement by holding that there was a "quasi trust" only. The United States Supreme Court has long been committed to the "trust fund" doctrine, yet in the recent case of *Hollins v. Brierfield &c. Co.* (150 U. S. 371) Justice Brewer practically admits that the expression is figurative; and Justice Bradley, in *Graham v. R. R. Co.* (102 U. S. 148), while upholding the doctrine, is forced to acknowledge that "if pushed to its logical conclusion, it would lead to results not to be tolerated," and yet he does not seem able to define the limits within which it will be tolerated.

This general haziness that surrounds the whole doctrine leaves the student in a confused state of uncertainty as to what the doctrine really is. Mr. Pepper, however, in a recent able article (2 Am. Law. Reg. & Rev., N. S. 448), clears up much of this uncertainty. He deprecates the use of the expression "trust fund" as a misleading misnomer, and suggests that the courts have used it as a cover for judicial legislation. The cases seem to justify this view, and it must be admitted that justice often demands legislation by the courts in dealing with insolvent corporations.

RECENT CASES.

ADMIRALTY—RECOVERY FOR DEATH BY WRONGFUL ACT.—Where a State statute gives the personal representative of one killed by the negligent handling of a vessel a right of action, and makes any damages that may be recovered a lien upon such vessel, *held*, a suit may be maintained in the Federal courts to enforce such right of action. *The Willamette*, 70 Fed. Rep. 874.

It has been frequently argued that there can be no recovery in suits of this kind, on the ground that there is no action given by general maritime law, and it is not competent for a State to alter this. But statutes giving a recovery exist in some thirty States, and their validity has been upheld in *Sherlock v. Alling*, 93 U. S. 99. An elaborate review of the authorities is found in *The City of Norwalk*, 55 Fed. Rep. 98.

BILLS AND NOTES—FICTITIOUS PAYEE.—A clerk of the plaintiffs represented to them that they were indebted to B., and they drew a check to the order of B. in payment. There was no such person as B., and the clerk indorsed the check to the defendant, a *bona fide* purchaser, who received payment from the bank. In an action for the money, it was *held*, that the check was payable to bearer, and there could be no recovery against the defendant, a holder in due course. *Clutton v. Attenborough*, [1895] 2 Q. B. 707.

This affirms the judgment of Wills, J., [1895] 2 Q. B. 306. The Bills of Exchange Act, 1882, provides that where the payee is fictitious the bill may be treated as payable

to bearer, and perhaps as a question of construction the decision above is correct. The case of *Bank of England v. Vagliano Bros.*, [1891] App. Cas. 107, on which the court rely chiefly, should be distinguished, however. It is the intention of the drawer, and not that of the acceptor, which governs, and hence, apart from the statute, the Vagliano case would seem to be right and the principal case wrong. The correct result was reached in *Shipman v. Bank*, 126 N. Y. 318, and in *Armstrong v. Bank*, 46 Oh. St. 512. See *Kohn v. Watkins*, 26 Kan. 691, *contra*; and so in the case of the making of a note; *Ort v. Fowler*, 31 Kan. 478, and *Bank v. Rowan*, 14 N. S. W. L. R. 127.

BILLS AND NOTES — FORGED INDORSEMENT. — The innocent indorsee of a bill bearing a forged indorsement received the amount of the bill at maturity from the drawee, who, having paid the bill again to the true owner, seeks to recover back the money paid to the *bona fide* holder. *Held*, the drawee cannot recover. *The London & River Plate Bank v. The Bank of Liverpool*, [1896] 1 Q. B. 7. See NOTES.

BILLS AND NOTES — VENDOR'S LIEN — PAYMENT BY INDORSER. — *Held*, where A. held two notes of the same date secured by a vendor's lien, and the one first due was dishonored and taken up by an endorser, and then transferred without A.'s knowledge, the lien on this note was postponed to that on the one still held by A. *Goddard v. Peebles*, 33 S. W. Rep. 314 (Tex.).

The two liens should have been held co-ordinate. If the *maker* of the note had paid it and then sent it out again, the decision of the court would of course be sound. *Union Trust Co. v. R. R. Co.*, 63 N. Y. 311.

CARRIERS — LIABILITY ON BILL OF LADING. — The defendant company, on receipt of certain grain, issued a bill of lading in one part, and also two duplicates of this original. On the original there was no mention of any other bill, nor any clause "this being accomplished the others to stand void." The plaintiffs were pledgees of the original bill of lading. The defendants delivered the grain to the original shipper on his presenting one of the duplicate bills. The plaintiffs then brought this action against the defendant company. *Held*, that the railway company was liable on its bill of lading. *Midland Nat. Bank v. Missouri Pacific Ry. Co.*, 33 S. W. Rep. 521 (Mo.).

This is an admirable decision. A carrier issuing bills of lading in this form binds himself to deliver to its holder, and any other delivery is made at the risk of being unable to fulfil his contract and becoming liable therefor. Bills of lading in this form do not seem to have been the subject of litigation before this case. In *Forbes v. Boston & Lowell Ry. Co.*, 133 Mass. 154, the carrier was held liable to the holder of a bill of lading for the mis-delivery of certain corn. On the other hand, local custom was held sufficient excuse for giving up certain wheat without presentation of the bill. This is not so clear. In the principal case the court rightly held the duplicates to be mere memoranda, and of no more effect than memoranda.

CONSTITUTIONAL LAW — EMINENT DOMAIN — PUBLIC SERVITUDE. — A citizen of Mississippi sought to enjoin the construction of a levee across his plantation, situated upon a navigable river in Louisiana. Defendants justified under a legislative act. *Held*, by the substantive law of Louisiana, plaintiff's land, and all similarly situated, is held subject to a right in the State to take any part needed for levees, without compensation. *Eldridge v. Trezevant*, 16 Sup. Ct. 345.

The Supreme Court of Louisiana has frequently followed this rule, although the Constitution of that State (Art. 156) forbids a public taking of private property without compensation. The Supreme Court of the United States thought that plaintiff could not invoke the Fourteenth Amendment, which is satisfied if the State law is impartially administered, — here admittedly the fact. Previous cases have arisen under grants by France and Spain; the present case concerned land granted by the United States, but the rule was applied, the court thinking the matter settled by the decisions that the extent of riparian titles to land upon navigable non-tidal rivers, though granted by the United States, depended upon the law of the State in which such land is situated. It thought that the same cases decided that land granted by the United States is subject to local regulations applicable to land held under State grant; also that the Fourteenth Amendment does not apply to servitudes, held by the State courts to be valid. It is doubtful whether any of the cases cited go, in terms, to the extent of the part of the proposition last stated, though the decision seems correct. For a full discussion of the general subject, see *Shively v. Bouilly*, 152 U. S. 1. *Peart v. Meeker*, 45 La. Ann. 421, is a recent case under the Louisiana rule.

CONSTITUTIONAL LAW — LICENSES — PEDDLERS. — A statute providing that city and town authorities "may issue a license to such persons as they find proper persons to engage in a temporary or transient business . . . for the sale of goods, wares, and merchandise," for certain fees, and making it a misdemeanor to engage in such business

without a license, was *held* unconstitutional, since it gives officers power to exercise an arbitrary discretion in granting licenses. *State v. Conlon*, 33 Atl. Rep. 519 (Conn.).

A very forcible argument might be made that the context indicates that the words "may issue a license" should be construed "shall issue a license"; and that the words "such persons as he finds proper" vest in the officer not an arbitrary discretion, but a discretion which he is bound to exercise honestly and reasonably, for the purpose of effectuating the intention of the statute. *State v. Yopp*, 97 N. C. 477; *Singer v. Maryland*, 72 Md. 464; *Comm. v. Parks*, 155 Mass. 531. The act would thus be preserved, and the rights of those against whom it was directed would be sufficiently protected, since, if the officer abused his power by exercising an arbitrary discretion, his act would be unconstitutional and invalid. *Yick Wo v. Hopkins*, 118 U. S. 356. However, words less strong than those in the principal case have been held to confer an arbitrary discretion. *Mayor of Baltimore v. Radecke*, 49 Md. 217; *State v. Dering*, 84 Wis. 585. It is to be noticed that those are cases of city ordinances, and might be supported on the ground that the legislature does not give a city the right to make unreasonable ordinances, and the ordinances in question afford such an opportunity for unreasonable action on the part of the officers as to make them unreasonable ordinances.

CONSTITUTIONAL LAW — SEIZURE OF PRIVATE PROPERTY AS CRIMINAL EVIDENCE. — A steam boiler exploded on plaintiff's premises, killing thirty-seven persons. The engineer was indicted for criminal negligence, and ten days after the accident the court ordered the boiler and engine into the custody of the police, not to be removed from the premises, to be used as evidence against the engineer in the pending trial. Plaintiff applied for a writ of mandamus to vacate this order, as an unwarrantable interference with his rights of property. *Held*, such an order directed against private property of this character belonging to an innocent party was an unreasonable seizure of goods, and unconstitutional. McGrath, C. J., dissenting on the point of unreasonableness. *Newberry v. Carpenter*, 65 N. W. Rep. 530 (Mich.).

No reported case seems to have gone to the length of sustaining a seizure like the present. Most of the instances where personal property belonging to a third party has been held as evidence by public officers have been cases of stolen property, tools, and coin used in counterfeiting, gaming apparatus, etc. In the principal case it was perfectly possible to preserve evidence of the condition of the boiler without depriving the owner of its use, and the attempted seizure seems plainly unreasonable.

CONTRACTS — PUBLIC POLICY — DEFENCE. — *Held*, that where a contract is not in general restraint of trade according to the rule in *The Diamond Match Co. Case*, 106 N. Y. 473, a defendant who retains the consideration for his promise cannot set up as a defence that his contract is part of a conspiracy to raise prices and lower wages. *National Wall Paper Co. v. Hobbs*, 35 N. Y. Supp. 932.

It would seem that where a contract is shown to be part of a general scheme to lessen competition, the court should not aid either party in enforcing it. Illegality should be a perfect defence to an action on a contract. *Emery v. Ohio Candle Co.*, 47 Ohio St. 320; 68 N. Y. 558, 566.

CONTRACTS — SALVAGE — FRAUDULENT CONCEALMENT — COMPENSATION. — A salvage contract was entered into between the master of a tug and the master of a disabled steamer, the former suppressing the fact that the owners of the steamer had already employed another tug to tow the steamer to her destination. *Held*: (1) the contract must be set aside on account of fraud; (2) the master of the tug is entitled to recover the amount by which the steamer was found to have been actually benefited by comparing the expense actually incurred with that which would have attended a towage by the tug engaged by the owners. Goff, Circuit Judge, dissenting on second point. *The Clandeboye*, 70 Fed. Rep. 631.

The rule invoked, that if the sources of knowledge of material facts are exclusively within the possession of one of the contracting parties there is a duty to disclose (2 Kent, *482), would seem to be included within Bigelow's broader proposition, that "a duty to speak . . . arises wherever and only where silence can be considered as having an active property, that of misleading." 1 Bigelow on Fraud, 597. As to the right to recover compensation, there is a strong analogy to cases where a conveyance of land has been obtained by the fraud of the buyer; there the seller may have a reconveyance, but is obliged to pay back the consideration money and sums laid out in improvements. Kerr, Fraud and Mistake, 2d ed., 373. One rescinding on account of fraud must put the other party in the same position, as far as possible, as he was in the beginning.

CORPORATIONS — FEDERAL JURISDICTION — COLLUSIVE CONVEYANCE. — X., a Virginia corporation, claimed to own land in Virginia which was in possession of defendant. For the purpose of trying the claim in the Federal Court, the stockholders of X.

organized plaintiff corporation under the laws of Pennsylvania. X. then conveyed to plaintiff without consideration, and plaintiff brings suit in the Federal Court. *Held*, that such conveyance would not enable the grantee to maintain suit. Shiras, Field, and Brown, JJ., dissenting. *Lehigh Co. v. Kelly*, 16 Sup. Ct. Rep. 307.

The rule is well established that notice in this class of cases will not affect the right of the grantee to Federal jurisdiction if the conveyance was a real transaction and there was no secret agreement giving grantor a right to call for reconveyance. *McDonald v. Smalley*, 1 Pet. 625; *Barney v. Baltimore City*, 6 Wall. 280. The court admits that there was no such secret agreement between the two corporations, but in view of the fact that no consideration was paid, it goes behind the entity of the plaintiff corporation and finds what it calls an "equivalent to such agreement," namely, the right and power of those who are stockholders in each corporation to compel the plaintiff to reconvey to X. without consideration. If there had been a consideration for the conveyance, the question of whether the court would look behind the entity would have been very squarely presented. This is a question that is constantly arising in different phases. Compare *Northwestern Banking Co. v. Muggli*, 65 N. W. Rep. 442 (S. D.), and *Howes v. Oakland*, 104 U. S. 450.

CORPORATIONS — UNPAID SUBSCRIPTIONS — ILLEGALITY SUBSEQUENT TO INCORPORATION.—In an action by a corporation to recover unpaid subscriptions to its capital stock, the defence was set up that the corporation had entered into illegal transactions subsequently to its incorporation. *Held*, that this is no defence, the objects of incorporation being on their face legal. *U. S. Vinegar Co. v. Foehrenbach*, 42 N. E. Rep. 403 (N. Y.).

The case simply follows *U. S. Vinegar Co. v. Schlegel*, 143 N. Y. 537, which laid down the doctrine that subsequent acts of illegality, though they might be good ground for vacating the charter in a direct action by the State, were no defence to an action by the corporation to recover unpaid stock subscriptions.

DAMAGES — CONVERSION OF STOCK BY ONE AUTHORIZED TO TRANSFER IT AS COLLATERAL.—Stock in a certain company was issued to the defendant in his own name for the benefit of the plaintiff, from whom he had authority to transfer it as collateral security for a loan of \$5,000 for the plaintiff. Having transferred the stock to W. to secure the loan, turning the proceeds over to the plaintiff as per agreement, he subsequently sold it to W. absolutely, without accounting to the plaintiff, who seeks to recover for the alleged conversion. *Held*, plaintiff was not entitled to recover the full value of the stock, but must deduct the amount received as the loan. *Van Shaick v. Ramsey*, 35 N. Y. Supp. 1006.

The result reached seems correct. The difficulty is to find a conversion on the part of the defendant when he has already transferred the legal title with the authority of the beneficial owner; moreover, the plaintiff never had legal title to the stock himself. The first objection is perhaps obviated by the fact that, though the court speaks of the first transfer by the defendant as a mortgage, it is more properly regarded as a pledge, the legal title remaining in the pledgor. Lowell on Transfer of Stock, § 53: *Lewis v. Graham*, 4 Abb. Pr. 106. A simpler way of treating the case would seem to be as a breach of trust on the part of the defendant in releasing the equity of redemption which he held in trust for the plaintiff, in which view of the case the amount of damages would follow as a matter of course.

DAMAGES — ELECTRIC RAILWAY — USE OF CABLE TRACK — COMPENSATION.—An electric railway was granted by the city of St. Louis the right of using the tracks of a cable railway. The cable company was allowed a sum equal to six per cent per annum on half the cost of building. *Held*, the cost of building the cable conduit should be included, though the conduit cannot be used by the electric company, and its construction made the cost of the cable road much greater than that of an electric road. *Grand Avenue Railway Co. v. People's Railway Co.*, 33 S. W. Rep. 472 (Mo.).

It is fairly well settled that a city, in the absence of express legislative enactment, has no power to grant exclusive street railway rights to a single corporation. *New Orleans v. Crescent R. R. Co.*, 12 Fed. Rep. 308. It would seem logically to follow that, when a city gives a railway company the right to use the tracks of another company, it exercises a reserved right rather than the right of eminent domain. This view has been adopted in Missouri. *Union Depot R. R. Co. v. Southern R. R. Co.*, 100 Mo. 562. The question presented in the principal case therefore is not one of damages for condemnation of property under eminent domain, but a question simply of what is "just compensation" for the use of the tracks by the electric road. The exact question here presented does not seem to have arisen before, but the decision, it is submitted, is sound. Of course, there is a strong argument that, as the electric road does not use the conduit, it ought not to be made to pay for the use. The answer is that, though

it may not actually use the conduit, yet for the time being it prevents the cable company from using it. The sound doctrine would seem to be that the electric company takes the road as it finds it, and must pay in proportion to the total original cost, whether they use the conduit or not — whether they use one rail or both rails.

EQUITY — DEGREE OF SPECIFICATION FOR DISCOVERY. — In an action for selling coal as plaintiffs' which in fact was not theirs, there were allegations that defendants had "on divers occasions taken orders from A. and divers other persons" in the supply of which they had given coal as from plaintiff's mines which was not from there, and of a quality inferior to that. Sale to A. was admitted by defendants, but objection was made to discovery and production of books till further specification of the alleged torts. *Held*, there is no definite rule governing the degree of concreteness in such allegations. This is not a case where plaintiffs are seeking to establish a possible claim from defendants' books. Discovery to precede the order to give particulars. *Waynes Merthyr Company v. Radford & Co.*, [1896] 1 Ch. 29.

No one can quarrel with such a case. The allegations were the only ones possible to most plaintiffs in the same circumstances, and the books of defendants would be highly relevant to their substantiation. The rule against fishing is necessarily one of convenience to prevent the institutions of vexatious and baseless suits. Here there had been one distinct allegation which defendants had admitted in proceedings relative to the interim injunction. It is hard to see how a judge could have in reason demanded a full specification of the wrongful alleged sales without inspection of defendants' books, though plaintiffs might well be assured that there had been such sales by collateral circumstances such as they alleged in the depreciation in the price of their own coal.

EQUITY — JUDGMENT — BILL IN EQUITY TO VACATE. — Final judgment having been rendered in a suit, the defendant brought a bill in equity to have the judgment vacated on the ground of fraud, the fraud alleged being the false statement by the attorney of the plaintiff, out of court, that certain allegations in his complaint were true. *Held*, no ground for vacating the judgment. *Town of Andes v. Millard*, 70 Fed. Rep. 515.

The recent case of *Zellerbach v. Allenberg*, 67 Cal. 296, lays down the rule that to vacate a judgment on the ground of fraud, it must appear that the fraud was practised in the very act of obtaining judgment; for any fraud anterior to that is a defence available at law, and therefore concluded by the judgment. It is difficult to formulate a general rule in this class of cases, and the above is perhaps too comprehensive. See *In re O'Neill's Estate*, 63 N. W. Rep. 1042 (Wis.); *Noyes v. Loeb*, 24 La. Ann. 48. The decision in the principal case, however, is clearly correct. Nothing appears to take it out of the rule stated above.

EQUITY — VENDEE'S LIEN — CONSIDERATION WHOLLY PAID. — M. agreed to convey to T. an undivided half of certain premises. T. gave the full consideration. M. died, having executed a trust deed to secure a loan, without conveying to T. and T. filed this bill against her administrator for an account and a sale of the premises. *Held*, that, as specific performance is an inadequate remedy, plaintiff is entitled to a lien on the whole premises. *Townsend v. Vanderwerker*, 16 Sup. Ct. Rep. 258.

It seems well settled now that a vendee has a lien for purchase money paid when specific performance is inadequate or impossible, on the same broad equitable grounds on which the vendor's lien rests. *Galbreath v. Reeves*, 82 Tex. 257; *Wickman v. Robinson*, 14 Wis. 493; *Wythes v. Lee*, 3 Drew, 396; *Rose v. Watson*, 10 H. L. Cas. 672. In the principal case, strangely enough, though the whole consideration has been given, the equitable lien is better for plaintiff than specific performance. The result seems right. The plaintiff has an equitable title to half the premises. As M. charged the estate with a debt, her share should be taken first to pay that off, and so plaintiff should be allowed a lien on the proceeds of the sale after satisfaction of that debt.

EVIDENCE — ANCIENT DOCUMENTS — PROOF OF CONTENTS. — Where an instrument itself would be admissible without proof of execution, being over thirty years old, and its absence is satisfactorily accounted for, *held*, that evidence of its contents was likewise admissible without proof of execution. *Walker v. Peterson*, 33 S. W. Rep. 269 (Tex.).

This is an interesting result from the application of two rules. The loss of the document being explained, secondary evidence of its contents was properly admitted, and, being an ancient document, proof of execution was unnecessary.

EVIDENCE — HEARSAY. — To prove the age of a girl who had been abducted, the evidence of a school teacher, to whom the girl had told her age, was offered. It was rejected because the witness had to refer to her school record to show it, and without

the record could not remember it. *Held*, error. The court, following previous decisions, were of opinion that the witness should be allowed to read the record if her memory failed. *People v. Brown*, 35 N. Y. Supp. 1009.

While not quarrelling with the court's decision that witness might read the attested record, there is another obvious and fundamental objection to the admission of this evidence. The teacher was not one in a position to give direct evidence on the point in issue, and whatever she might say would be purely hearsay, and so assuredly inadmissible. A case much like the present in its facts, and correctly decided the other way, is *Brain v. Preece*, 11 M. & W. 773.

EVIDENCE—SABBATH-BREAKING—BURDEN OF PROOF OF THE NECESSITY OF THE ACT.—On an indictment for Sabbath-breaking in working a pump and a fan in a mine on Sunday to keep it free from water and gas, it was *held* that the burden is on the defendant to prove that the work is one of necessity. *Shipley v. State*, 33 S. W. Rep. 107 (Ark.).

The case seems to proceed on the ground that it is a fact peculiarly within the knowledge of the defendant; if this were a general principle, a criminal would usually have to prove his own innocence. The true ground would seem to be that the duty of going forward with evidence is cast upon the defendant in order to rebut the natural inference that this is not a necessary operation.

JURISDICTION OF SUPREME COURT ON APPEAL FROM A STATE COURT.—In an action for damages for ejection of plaintiff from a car, the conductor refusing to receive a worn ten-cent piece in payment of the fare, the jury found a verdict for the plaintiff. Judgment was affirmed by the Supreme Court of New Jersey. Defendant now appeals to the United States Supreme Court, contending that his right to do so is secured by Rev. Sts., § 709, providing that where any title, right, etc. is claimed under the Constitution or laws of the United States, and the State court decides against such title, right, etc., a writ of error lies to the United States Supreme Court. *Held*, contention of defendant that the coin was not legal tender under the laws of the United States is not a claim to any right under such laws, but a denial of such claim; therefore the decision of the State court against the defendant is not against such a right so as to authorize a review by the Supreme Court of the United States. *Jersey City & B. R. Co. v. Morgan*, 16 Sup. Ct. Rep. 276.

It is to be noticed that a coin worn merely by natural abrasion is legal tender. The jury found the ten-cent piece to have been so worn. Defendant, though he denied that the coin was legal tender, did not set up any right under a United States law in reference to the reduction in weight of silver coin by natural wear and tear. As he did not, he could not be said to have been denied any right under the laws of the United States.

MUNICIPAL CORPORATIONS—LIABILITY FOR DEFECTIVE WATERWORKS.—*Held*, that a municipality which maintains a public system of waterworks under a power conferred by the State, is not liable for loss of property by fire caused by defective condition of the waterworks. *Springfield Fire & Marine Insurance Co. v. Village of Keeseville*, 42 N. E. Rep. 405 (N. Y.). See NOTES.

PARTNERSHIP—GOODWILL—RIGHT OF RETIRING PARTNER TO SOLICIT CUSTOMERS OF THE OLD FIRM.—The defendant, on becoming a partner in plaintiff's firm, agreed that the goodwill of the business should remain the property of the plaintiff. *Held*, that plaintiff was entitled, on defendant's retirement from the firm, to an injunction restraining the defendant, his partners, servants, or agents, from applying privately by letter, personally, or by a traveller to any person who was, prior to the dissolution of the firm, a customer of the firm, asking such customer to continue after dissolution of the firm to deal with the defendant, or not to deal with the plaintiffs. *Trego v. Hunt*, 12 The Times Law Rep. 80. See NOTES.

PERSONS—DAMAGES RECOVERABLE IN TORT BY MARRIED WOMAN.—*Held*, that, in an action of tort brought by a married woman for personal injuries, her impaired capacity to labor may be considered by the jury in estimating damages. *Harmon v. Old Colony R. Co.*, 42 N. E. Rep. 505 (Mass.). See NOTES.

PERSONS—MARRIED WOMEN—STATUTE OF LIMITATIONS.—In an action for personal injuries to a married woman where the husband has to be made a nominal party, it was *held* that the action was not barred, though the statutory time had elapsed, since married women are expressly given a longer time by the statute. *Fink v. Campbell*, 70 Fed. Rep. 665.

This case presents an example of the effect of the removal of the disabilities of married women, without at the same time giving them the corresponding burdens. 2 Wood on Lim. § 240.

PERSONS — OBLIGATION OF HUSBAND TO SUPPORT WIFE AND CHILD LIVING APART FROM HIM. — Where, pending proceedings on a petition for divorce by a wife who with her minor daughter is living apart from her husband, temporary alimony is allowed, the court will presume such alimony was meant to include a physician's bills for services to the wife and child, but anyway the husband cannot be charged without showing a contract by him to be so charged. *Hyde v. Luenring*, 65 N. W. Rep. 536 (Mich.).

As the petition for divorce ultimately was dismissed, thus showing she left her husband without cause, the decision seems unquestionable. Had she left with cause, it is doubtful if the physician could have recovered for necessary attendance on the child, though for such attendance on the wife, generally speaking, he could. *Reynolds v. Sweetser*, 15 Gray, 78, holds that a wife leaving her husband with proper cause carries with her his credit, so as to make him responsible for the necessary expenses of both. This decision is due to the Massachusetts doctrine that a father is liable for necessities furnished to his infant child without express contract on his part. At the common law no such liability accrued from the mere duty to support, which was regarded as a moral and not a legal duty. *Shelton v. Sprugett*, 11 C. B. 452. The Massachusetts court thought it a legal duty. There are other decisions holding the duty a legal one. 79 Ia. 151, and cases cited. But whether we follow the strict common law doctrine or not, the decision in the principal case would seem correct.

PROPERTY — CONVEYANCE OF AN EXPECTANT ESTATE. — A son, for valuable consideration, executed a deed purporting to pass all the interest in his father's estate which he then had, or might be entitled to on his father's death. *Held*, that such conveyance of a bare possibility, not coupled with an interest, was void. *McCall's Administrator v. Hampton et al.*, 32 S. W. Rep. 406 (Ky.). See NOTES.

PROPERTY — COVENANT OF WARRANTY — LIABILITY OF REMOTE WARRANTOR. — A. conveyed land to B. by warranty deed, reciting a consideration of \$5,000. Really but \$500 was paid. B. conveyed to C., and C. to D. D. was ejected by the possessor of a title paramount to A.'s. D. sued A., and claimed to be entitled to recover the full consideration recited in the deed. *Held*, while a warrantor may show by parol as against his immediate grantee that the consideration was less than that recited in the deed, he cannot show it as against a remote grantee purchasing without notice. *Allison v. Putkin*, 33 S. W. Rep. 293 (Tex.).

In jurisdictions which limit the damages on a covenant of warranty to the consideration paid, the rule stated in the principal case is well settled. *Greenwalt v. Davis*, 4 Hill, 643, 649; *Illinois S. & S. Co. v. Bonner*, 91 Ill. 114. The warrantor is estopped to deny the recital in his original deed, but probably the remote assignee would be allowed to show a real consideration greater than stated in the deed. 3 Sedg. Dam. (8th ed.), 103, (§ 965).

PROPERTY — DEDICATION — ESTOPPEL. — *Held*, that the sale of lots as bounding on an unopened street, appearing on the grantor's map, is a complete dedication of that street to the public without acceptance or user, and that the lapse of twenty-three years is not an abandonment. *Mayor of Baltimore v. Frick*, 33 Atl. Rep. 435 (Md.).

In general, to create a public right the public must accept the offer by user or otherwise. But in the cases of a dedication by sale of lots with reference to the grantor's map by the weight of authority the offer is held irrevocable. *Trustees, etc. v. Council of Hoboken*, 33 N. J. L. 13; *Meier v. Portland C. Ry. Co.*, 16 Or. 500; *Eliot, Roads*, 89, 129. Cases of this kind fall into two classes; (1) where a town site is laid out, and (2) where merely a small parcel of land is divided up. In the first class the purchasers of lots may be said to constitute the public. As the doctrine of irrevocability is rested on estoppel, it would seem to be a question, in the second class of cases more especially, whether the purchasers relied on an offer of the road-bed to the public to be used when occasion should justify it, or whether all they bargained for was a private right of way. See Angell on Highways, § 156.

PROPERTY — DONATIO CAUSA MORTIS. — Testator, on the eve of departure on a journey for his health, handed certificates of stock to his nephew, saying, "I always intended that for you. . . I don't know whether I will ever come back or not. . . I don't think I can get over this disease. . . I can't expect it." The nephew took the certificates and kept them till after the donor's death, which, though it did not occur till his return from the journey, was due to the illness of which he complained. The certificates had no form of assignment indorsed on them. *Held*, a valid gift *causa mortis* was shown. *Leyson v. Davis*, 42 Pac. Rep. 775 (Montana).

The case is a plain one, as the gift was meant to be complete, the certificates were delivered, and the donor failed to recover from the illness from which he contemplated

death at the time of his gift. The learned and lengthy discussion by the court, which cites authorities from the times of Justinian to our own, makes the case interesting.

PROPERTY — EJECTMENT — POSSESSION. — *Held*, that, where title by descent was established by neither party, prior possession would prevail, and that building monuments about the land, which could not be fenced, and bringing lumber on it to build, was sufficient possession for this purpose, even though insufficient to establish title by adverse possession. *Mission of Immaculate Virgin v. Cronin*, 36 N. Y. Supp. 77.

The distinction here made between two kinds of possession, as though a physical difference existed, is becoming quite common in the courts. It is generally thrown off; as it is here, by way of *dictum*, and is neither a real nor a desirable one to establish. See *Hunter v. Starin*, 26 Hun, 529, and *Wheeler v. Spinola*, 54 N. Y. at p. 387. No such distinction is recognized in Pollock on Possession. See Part II. chap. iii. § 17. The basis of the decision in this case is thoroughly well established law. Tyler on Ejectment, chap. iv.

PROPERTY — FIXTURES — VENDOR'S LIEN AS AGAINST MORTGAGEE. — On a sale of mortgaged property, the vendors of machines placed in a mill partly before and partly after the mortgage, set up as a lien the condition of the purchase that title should remain in them until payment. The machines were held in place by bolts. *Held*, since they were placed in the building by the mortgagor to carry out its purpose, and were essential to its completeness, all the machines passed to the mortgagee. *Cunningham v. Cureton*, 23 S. E. Rep. 420 (Ga.).

Three views are held on this question: one, that the lien on the fixtures prevails even against a mortgage subsequent to their annexation; *Tift v. Horton*, 53 N. Y. 377; another, in agreement with the principal case; *Clary v. Owen*, 15 Gray, 522; and a third, that only those fixtures annexed prior to the mortgage pass by it; *Davenport v. Shants*, 43 Vt. 546. The last, it is submitted, is the correct view, since it gives the mortgagee the security of all on which he advanced his money, and at the same time protects, in part at least, the contract of the mortgagor with the vendor.

PROPERTY — WILLS — ADEMPMENT. — The testator devised his interest in a farm to defendants, and his personal property to plaintiff. Before the execution of the will the testator had contracted to sell the farm for \$1,600 payable after his death, interest meanwhile payable to himself. After the execution of the will testator executed a deed to the vendee, and took the vendee's promissory note for \$1,200 payable in one year. At the testator's death the note, though due, remained unpaid. *Held*, the devisees of the land were entitled to the note. *Frick v. Frick*, 33 Atl. Rep. 462 (Md.).

When a testator devises land which at the time of the execution of the will he is under contract to convey, he is held to intend that the devisee shall take not merely the legal title to the land, but also the testator's rights under the contract of sale. Hence, if the testator dies, — the contract of sale remaining executory on both sides, — the devisee takes the land and will be entitled to the purchase money on the execution of the contract. *Wright v. Minshall*, 72 Ill. 584; *Woods v. Moore*, 4 Sandf. 579; *Drent v. Vause*, 1 Y. & C. Ch. 580. If the testator has, during his life, conveyed the legal title to the vendee leaving the vendee's part of the contract executory, it must follow that the devisee will still be entitled to the testator's contract rights against the vendee, i. e. to collect and retain the purchase money. Further, it would seem that the devisee should succeed to the testator's rights against the vendee, even though those rights have been modified by agreement between the testator and vendee subsequent to the execution of the will. In the principal case, if the transaction at the time the land was deeded to the vendee ought to be regarded as an entirely new contract, rescinding the former contract, rather than as a mere modification of the old contract, it is difficult to reconcile the decision with *Pattison v. Pattison*, 1 Myl. & K. 12.

STATUTE OF FRAUDS — INCORPORATION BY REFERENCE. — Defendant's real estate agent wrote him a letter informing him of an offer, but omitting the name of the proposed purchaser. Later the agent wrote to the defendant's solicitor as follows: "At Mr. Peter's request I send you the name of the purchaser of the above. It is Mr. H. Burlinson." Both notes were signed by the agent. In an action to enforce specific performance, *held*, the letters cannot be connected so as to satisfy the Statute of Frauds. *Potter v. Peters*, 72 L. T. Rep. 624. See NOTES.

SURETYSHIP — DISCHARGE OF SURETIES. — By the body of a bond, A., B., and C. were named as sureties, C.'s liability being fixed at £50. After the signing by A. and B., C. signed, and added after his name "£25 only." *Held*, this released the liability of A. and B., being a non-compliance with the conditions on which A. and B. signed

And since C. only agreed to enter into a joint obligation, he is discharged also. *Ellismere Brewery Co. v. Cooper et al.*, [1896] 1 Q. B. 75.

The case is clearly right, but is interesting as an unusual application of the well settled rule indicated in the opinion, that an obligee cannot hold sureties when the execution is manifestly not in conformity with the conditions specified in the body of the instrument. See Brandt on Suretyship, § 411, for a collection of the authorities.

TORTS — CONTRIBUTORY NEGLIGENCE. — DUTY OF PERSON CROSSING ELECTRIC STREET CAR LINES. — Plaintiff's intestate alighted from defendant's street car, and attempted to cross the other track behind the car, without looking for cars on this track. He was struck by a passing car and killed. The lower court charged the jury that the rule in regard to street railways was the same as that applied to steam railways; if the deceased by looking could have seen the approaching car, his omission to look was, as a matter of law, contributory negligence. *Held*, error. Inasmuch as electric street cars run with less noise than steam cars, are within better control of those running them, and their approach is less apt to attract attention, it is a question for the jury whether an omission to look and listen before crossing the track is negligence or not. *Doberst v. Troy City Ry. Co.*, 36 N. Y. Supp. 105.

The New York Supreme Court does not seem inclined to extend the application of its peculiar doctrine of "negligence as a matter of law" from failure to look and listen at a railway crossing. The inference of negligence as a fact from such conduct is doubtless less strong in the case of street railways than of steam railways, and probably if the case is carried up the Court of Appeals will take the same view of it.

TRUSTS — BREACH — LIABILITY OF TRUSTEE. — A trustee received a bribe of £300 for investing £3,000 of trust funds in certain securities. *Held*, (1) the trustee must account to the *cestui* for the bribe, and (2) must make good any depreciation in the value of the securities below £3,000, the purchase price. *In re Smith*, [1896] 1 Ch. 71.

It is well settled that a trustee will not be allowed to make use of his position as trustee as a source of profit for himself. Where a trustee received a bribe to resign his position and to recommend another as his successor, the trustee was held accountable to the *cestui* for the bribe received. *Sugden v. Crosland*, 3 Sm. & Gif. 192. On the second point decided in the principal case there seems to be no direct authority. If a trustee wrongfully invests part of the trust fund in a stock which appreciates and part in a stock which depreciates, in an action against him for breach of the trust, he cannot offset the gain to one fund against the loss to the other, but will be charged with the loss on the one fund undiminished by the gain on the other. *Wiles v. Gresham*, 2 Drew, 258. The principal case goes but a step beyond this. The trustee's liability in case there is a depreciation in the value of the trust securities below the purchase price, will not be diminished by the £300 bribe which he has been compelled to pay over into the trust fund.

WILLS — EFFECT OF LEGATEE CAUSING DEATH OF TESTATOR — PROCEDURE. — Plaintiff, claiming land as one of testator's heirs at law, brought an action for partition against the defendant, the devisee under testator's will, alleging will to be void because defendant poisoned testator to realize the benefits of the will. *Held*, the killing of a testator by a devisee for the purpose of realizing under a will does not render the devise void, but merely authorizes equity to deprive the devisee of the property devised. *Ellerson v. Westcott*, 42 N. E. Rep. 540 (N. Y.). See NOTES.

REVIEWS.

MERWIN ON EQUITY. — It is a matter of regret that it could possibly be inferred from the review of this book published last month that Mr. Merwin's editors had not given credit to the sources used in the preparation of their note on Privacy. As a matter of fact credit was given, and it was far from the intention of the reviewer to imply the contrary.